

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF
BRASFIELD & GORRIE, LLC

Respondent

And

Case No: 09-CA-199567

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA (UBC),
INDIANA/KENTUCKY/OHIO REGIONAL
COUNCIL OF CARPENTERS
LOCAL 8-719

Charging Party

UNION'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS BEFORE THE BOARD

The Union is submitting this Reply Brief in answer to Respondent's brief opposing the Union's Exceptions in the above-referenced case.

In its opposition brief, Respondent mischaracterized the Union's position. (Resp. brief, p.9 Sec. III, second par.) The Union's first Exception refers to the Board's decision in *National Steel*, 324 NLRB 499 (1997). In *National Steel*, the Board held that the administrative Law judge in that case was incorrect by stating, an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity. Rather, as the Board held in *National*

Steel, under the legal principles, the employer must show that it had a reasonable objective basis for anticipating misconduct. (*National Steel*, p. 499, fn 4). The Union's first Exception specifically states that the Administrative Law Judge used the wrong standard in the application of his decision. Rather than using an objective basis for anticipating conduct, as required under *National Steel*, the Administrative Law Judge in making his decision relied upon Respondent's subjective belief that misconduct had occurred when it took photographs and videotapes of the Union's activities.

Respondent argues in its opposition brief that the Administrative Law Judge correctly concluded that sufficient justification was established by Respondent to take photographs and videotapes of employees. Citing the Administrative Law Judge, "Finally, I reject General Counsel and the Union's arguments that Wickham took the photos and videos because he anticipated misconduct. The photos and video were taken while the misconduct was recurring." (Resp. Opp. Brief, p. 10, Ins, 8-9). As Respondent stated, "This conclusion, absent any other findings, serves as a sufficient basis for determining that the General Counsel failed to establish a violation of Section 8(a)(1) of the Act by Brasfield." (Resp. Opp. Brief, p. 10, Ins, 10-12).

In his Decision, the Administrative Law Judge refers to Wickham's photographing and videotaping of the employees as stated: (ALJ, Dec., p.10, Ins, 4-17)

"He (Wickham) testified that he took the photos after he saw the picketers blocking employees from safely crossing and accessing that entrance... Employees also reported the same to him. After personally seeing this, and after hearing from employees that they were unable to access the entrance, Wickham took two photographs of the picketers blocking the employee entrance. He testified that he did this because **he believed** (emp. added) the picketers were creating unsafe conditions, and he wanted to document it. Wickham did not say or do anything else to the picketers when he took the photos. In light of the evidence, and consistent with established precedent, **I find that Wickham, who is the Senior Safety Director, had a legitimate justification for photographing the picketers who were blocking employees from safely accessing the jobsite.**"

The Administrative Law Judge concluded his analysis in the same manner regarding the incident involving the three Union agents who stopped their trucks on South 3rd Street on May 25, 2017. As the Judge stated, Wickham did not say or do anything else other than take the video. (ALJ, p. 10, lns, 19-24)

The Administrative Law Judge's Decision in this case is not consistent with established precedent, but directly contradicts the law as stated in *National Steel*. As the Board held, "We further do not adopt the judge's statement that an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity. Rather, under the legal principles we have recited, the employer must show that it had a reasonable, objective basis for anticipating misconduct." (*National Steel*, supra, p. 499, fn 4)

In this case, no reasonable, objective basis was provided by Respondent in support of the Administrative Law Judge's decision that misconduct had occurred. As stated in the Union's brief in support of its Exceptions, Respondent introduced no testimony by witnesses other than Wickham that any employees were presumably prevented from entering the jobsite because of picketing activity. No evidence was submitted by Respondent to show that the police had issued citations against the Union or anyone because of any picketing activity that caused misconduct. No evidence was presented by Respondent that any safety issues had resulted because of any picketing activity at the jobsite. No evidence was presented by Respondent that any Union vehicles had blocked entrance or exit by anyone to or from the jobsite. No independent or neutral witnesses were presented by Respondent at trial stating that a blocking of ingress to the jobsite had occurred. No safety reports were issued by Wickham or any representatives of Respondent documenting that safety violations had occurred as a result of the picketing. No documentary evidence, including photographs, reports of the alleged misconduct, or any other probative evidence was submitted by Respondent at trial showing misconduct resulted because of the picketing. No police reports were introduced at trial indicating that the picketing resulted in misconduct. No evidence was submitted at trial by Respondent that Wickham had followed up at the

regular safety meetings reporting that any safety issues had resulted stemming from the picketing activity. No follow-up meetings were held by Respondent with its employees to explain the reason why Respondent had taken photographs and videotaped employees while they were picketing at the jobsite. See *Sunbelt Manufacturing, Inc.*, 308 NLRB 780, (1992) where the Board held that explaining the reason for the videotaping of employees in a meeting of its workforce was an important factor in meeting a legitimate justification under *National Steel*. Finally, no charges were filed by Respondent with the Board alleging that any of the Union activity related to this case had violated the Act.

Respondent argues in its opposition brief that the Union is contending that an accumulative amount of evidence is necessary to show that Respondent had violated the Act by its photographing and videotaping of the employees' picketing activity. Contrary to Respondent's assertion, the Union's position in this case is that the Administrative Law Judge did not apply the standards as set out under *National Steel* and the many cases following *National Steel*. Again, as the Board held in *National Steel*, the legal principles require that an employer must show it had a reasonable, objective basis for anticipating misconduct.

With respect to the Union's second Exception, it is the Union's position that the Administrative Law Judge incorrectly rejected the General Counsel and the Union's arguments that Wickham took the photos and videos because he anticipated misconduct. As the Administrative Law stated in his Decision, "The photos and video were taken *while the misconduct was occurring*. Wickham took the photos of the picketers as they were blocking employees from safely crossing the crosswalk and accessing the employee entrance to the site. Similarly, Wickham took the video of the Union agents as they were blocking traffic on South 3rd Street and impeding access to the vehicle entrance to the site." (ALJ Dec. p. 10, Ins, 30-35)

The Administrative Law Judge in his decision engages in circular argument. He begs the question by presuming that any misconduct had occurred as a result of the Union's activity and the

employees' picketing. As outlined above in this brief, and in the Union's brief in support of its Exceptions, no reasonable objective evidence was presented at trial showing that the Union and employees who were picketing at the jobsite had engaged in any misconduct. Respondent in its opposition brief attempts to support the Administrative Law Judge's argument by concluding, without a reasonable objective basis, that the employees and Union through their picketing activity had engaged in misconduct. Again, it is the Union's position that the Administrative Law Judge's Decision is contrary to the legal principles as set out in *National Steel*, where the Board rejected the administrative law judge's statement that an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity. (*National Steel*, supra, p. 499, fn, 4)

Based upon the above, it must be concluded that safety concerns were not the reason why the photographs and videotapes were made, and that the actions taken by Respondent in photographing and videotaping the picketing employees violated the Act. Accordingly, the Union respectfully urges that the Board reverse the Administrative Law Judge in this case and uphold the complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that I served the attached Counsel for the Union's Reply brief by e-mail today to the following at the addresses listed below:

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